Ghazali bin Hj Ibrahim v CIMB Bank Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 29–2464 OF 2011
MAH WENG KWAI J
4 JUNE 2012

Bankruptcy — Notice — Setting aside — Whether sum stated in second bankruptcy notice in excess of judgment sum allowed — Whether there was mistake in basis of calculation of interest — Whether defect could be remedied — Whether notice was invalid ab initio — Bankruptcy Act 1987 s 131

Civil Procedure — Res judicata — Issues, similarity of — Whether judgment debtor estopped from filing application to set aside second BN by doctrine of res judicata

CIMB Bank Bhd ('the judgment creditor') obtained judgment against Ghazali bin Haji Ibrahim ('the judgment debtor'). When the judgment sum was not satisfied the judgment creditor commenced bankruptcy proceedings against the judgment debtor. The judgment debtor sought to set aside the bankruptcy notice ('the first BN') issued against him on the grounds that the interest sum claimed in the notice was wrongly calculated and excessive. The learned SAR allowed the judgment debtor's application but on appeal the High Court allowed the appeal. The judgment debtor's appeal to the Court of Appeal was also dismissed. However, following the decision of the Court of Appeal, the judgment creditor filed fresh bankruptcy proceedings by filing a second bankruptcy notice ('the second BN'). The judgment debtor filed an application to set aside the second BN on the grounds that the sum claimed was in excess of the amount actually due and payable. The judgment debtor submitted that the judgment creditor had erred in calculating the interest on a compounded interest basis when the interest ought to be calculated on a flat or simple interest basis. The difference between the amount of interest calculated by the judgment creditor and the judgment debtor was RM932,300.90. The SAR allowed the application to set aside the second BN. This was the judgment creditor's appeal against that decision. The judgment creditor denied any mistake in the calculation of the interest and suggested that the mistake, if any, could be rectified when the proof of debt was filed after the judgment debtor had been adjudged a bankrupt. The judgment creditor further submitted that the judgment debtor was estopped from filing the application to set aside the second BN by the doctrine of res judicata.

Held, dismissing the appeal with costs of RM 3,500:

(1) The sum stated in the bankruptcy notice ('the BN') must correspond to

the sum that was actually due and payable by the judgment debtor. However, in the present appeal the amount claimed in the second BN was in excess of what was due. This court found that this was because the basis of calculation of the interest by the judgment creditor was wrong and that this basis was not provided for in the judgment. Further, the difference of about RM1m in interest was not a mere formal defect or irregularity which could be remedied under s 131 of the Bankruptcy Act 1987. The court was of the view that the excess interest claimed and the ensuing injustice caused to the judgment debtor could not be remedied by an order of the court. Thus, the second BN became invalid ab initio as it referred to a sum in respect of which the judgment creditor could not have issued execution (see paras 16, 18 & 26).

(2) Although the parties in the two BNs were the same and the subject matter in the two BNs was similar, ie calculation of interest, the bankruptcy proceedings were distinct and separate in that the judgment debtor's objection to the second BN was on the mode or basis of calculation. The judgment creditor could not rely on *res judicata* to prevent the judgment debtor from objecting to the second BN. The court was of the view that the facts of this case would not attract the application of an estoppel *per rem*, either as a cause of action estoppel or issue estoppel. Thus the judgment debtor was not prevented from applying to set aside the second BN by reason of *res judicata* (see para 28).

[Bahasa Malaysia summary

CIMB Bank Bhd ('pemiutang penghakiman') telah memperoleh penghakiman terhadap Ghazali bin Hj Ibrahim ('penghutang penghakiman'). Apabila jumlah penghakiman tidak dipenuhi, pemiutang penghakiman telah memulakan prosiding kebankrapan terhadap penghutang penghakiman. Penghutang penghakiman memohon untuk mengetepikan notis kebankrapan ('NK pertama') yang dikeluarkan terhadapnya atas alasan bahawa jumlah faedah yang dituntut dalam notis telah tersalah kira dan melampau. Penolong Kanan Pendaftar ('PKP') yang bijaksana telah membenarkan permohonan penghutang penghakiman tetapi atas rayuan Mahkamah Tinggi telah membenarkan rayuan itu. Rayuan penghutang penghakiman kepada Mahkamah Rayuan juga telah ditolak. Walau bagaimanapun, berikutan keputusan Mahkamah Rayuan, pemiutang penghakiman telah memfailkan prosiding kebankrapan baru dengan memfailkan notis kebankrapan kedua ('NK kedua'). Penghutang penghakiman telah memfailkan permohonan untuk mengetepikan NK kedua atas alasan bahawa jumlah yang dituntut melebihi jumlah sebenar yang kena dan mesti dibayar. Penghutang penghakiman berhujah bahawa pemiutang penghakiman tersilap mengira faedah yang berasaskan faedah yang dikenakan kompaun walhal faedah itu patut dikira berasaskan faedah sama rata atau biasa. Perbezaan antara jumlah faedah yang dikira oleh pemiutang penghakiman dan penghutang

penghakiman adalah RM932,300.90. PKP telah membenarkan permohonan untuk mengetepikan NK kedua itu. Ini adalah rayuan pemiutang penghakiman terhadap keputusan tersebut. Pemiutang penghakiman menafikan apa-apa kesilapan dalam pengiraan faedah itu dan mencadangkan bahawa kesilapan itu, jika ada, boleh diperbetulkan jika bukti keberhutangan difailkan selepas penghutang penghakiman diputuskan seorang bankrap. Pemiutang penghakiman selanjutnya berhujah bahawa penghutang penghakiman diestopkan daripada memfailkan permohonan untuk mengetepikan NK kedua itu oleh doktrin res judicata.

Diputuskan, menolak rayuan dengan kos RM3,500:

(1) Jumlah yang dinyatakan dalam notis kebankrapan ('NK') hendaklah selaras dengan jumlah yang sebenarnya kena dan mesti dibayar oleh penghutang penghakiman. Walau bagaimanapun, dalam rayuan ini jumlah yang dituntut dalam NK kedua itu melebihi apa yang kena dibayar. Mahkamah ini mendapati bahawa ini adalah kerana asas pengiraan faedah oleh pemiutang penghakiman adalah salah dan bahawa asas ini tidak diperuntukkan dalam penghakiman. Selanjutnya, perbezaan berhubung faedah RM1 juta bukan sekadar kecacatan formal atau salah aturan yang boleh dipulihkan di bawah s 131 Akta Kebankrapan 1987. Mahkamah ini berpendapat bahawa lebihan faedah yang dituntut dan berikutan ketidakadilan yang disebabkan oleh penghutang penghakiman tidak boleh dipulihkan melalui perintah mahkamah. Oleh itu, NK kedua itu menjadi tidak sah ab initio kerana ia merujuk kepada jumlah yang mana pemiutang penghakiman tidak mungkin mengeluarkan pelaksanaannya (lihat perenggan 16, 18 & 26).

(2) Walaupun pihak-pihak dalam kedua-dua NK itu sama dan perkara pokok dalam kedua-dua NK itu juga sama, iaitu pengiraan faedah, prosiding-prosiding kebankrapan itu adalah berbeza dan berasingan di mana bantahan penghutang penghakiman kepada NK kedua itu adalah berhubung cara atau asas pengiraan. Pemiutang penghakiman tidak boleh bergantung pada res judicata untuk menghalang penghutang penghakiman daripada membantah NK kedua itu. Mahkamah berpendapat bahawa fakta-fakta kes ini tidak menarik permohonan estopel per rem, sama ada sebagai kausa tindakan estopel atau isu estopel. Oleh itu penghutang penghakiman tidak dihalang daripada memohon untuk mengetepikan NK kedua atas sebab *res judicata* (lihat perenggan 28).]

Notes

For cases on issues, similarity of, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6770–6775.

For cases on setting aside, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3006–3050.

Cases referred to

Arunachalam; Ex Parte Indian Overseas Bank Ltd, Re [1968] 1 MLJ 89 (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Ghazali bin Mat Noor v Southern Bank Berhad and Four Other Appeals [1989] 2 MLJ 142; [1989] 1 CLJ Rep 35, SC (refd)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177; [2000] 2 AMR 2325, CA (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263; [1987] CLJ (Rep) 172, SC (refd)
Khaw Siew Suan; Ex Parte Asia Commercial Finance (M) Bhd, Re [2001] 1 MLJ 101; [2000] 8 CLJ 516, HC (refd)
Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304; [1988] 1 CLJ (Rep) 277, SC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 131

CS Murtti (Sundra Murtti & Co) for the debtor.
Daphne Khiew Jit Lee (Soo Thien Ming & Nashrah) for the creditor.

Mah Weng Kwai J:

BACKGROUND FACTS

[1] On 24 October 2008, the plaintiff ('the judgment creditor') obtained judgment against the defendant ('the judgment debtor') who together with two other defendants, was jointly and severally liable to pay the following:

Di bawah Kemudahan Jaminan Bank

1.1.

(i) Jumlah sebanyak RM3,968,554.80 setakat 30.11.2005;

(ii) Faedah ke atas RM3,968,554.80 pada kadar 3.5% setahun atas Kadar Pinjaman Asas Plaintif (Kadar Pinjaman Asas setakat 30.11.2005 adalah 6.00% setahun) dari 01.12.2005 hingga tarikh penyelesaian sepenuhnya;

Di bawah Kemudahan Pendahuluan Pinjaman Jangka Pendek

1.2.

(i) Jumlah sebanyak RM1,569,327.06 setakat 30.11.2005;

(ii) Faedah ke atas RM 1,569,327.06 pada kadar 2.0% setahun atas Kadar Pinjaman Asas Plaintif (Kadar Pinjaman Asas setakat 30.11.2005 adalah 6.00% setahun) dan faedah tambahan pada kadar 1.0% setahun dari 01.12.2005 hingga tarikh penyelesaian sepenuhnya.

[2] As the judgment sum was not satisfied, the judgment creditor commenced bankruptcy proceedings against the judgment debtor by issuing a bankruptcy notice dated 25 February 2009 (the first bankruptcy notice). The total sum stated in the first bankruptcy notice as being due and payable was RM7,653,071.03 (as at 25 February 2009).

[3] The judgment debtor filed an application to set aside the first bankruptcy notice on the ground that the interest sum claimed was wrongly calculated and was excessive.

[4] On 2 July 2009 the learned senior assistant registrar allowed the said application. Being dissatisfied with the setting aside, the judgment creditor appealed to the judge in chambers, who allowed the appeal on 1 December 2009.

[5] Subsequently, the judgment debtor filed an appeal to the Court of Appeal and on 1 March 2011, the Court of Appeal dismissed the judgment debtor's appeal.

[6] Following the decision of the Court of Appeal, the judgment creditor commenced fresh bankruptcy proceedings by filing a bankruptcy notice dated 31 May 2011 (second bankruptcy notice). The total sum stated in the second bankruptcy notice as being due and payable was RM9,428,998.06.

[7] On 6 July 2011, the judgment debtor filed a summons in chambers to set aside the second bankruptcy notice (within seven days of the service of the second bankruptcy notice on 1 July 2011) on the ground that the sum claimed was in excess of the amount actually due and payable by RM932,300.90.

[8] On 20 December 2011, the learned senior assistant registrar allowed the judgment debtor's application to set aside the second bankruptcy notice and dismissed the judgment creditor's application to serve the creditor's petition by way of substituted service.

[9] Being dissatisfied with the decision of the learned senior assistant registrar, the judgment creditor on 22 December 2011 filed an appeal to the judge in chambers (encl 18).

DECISION OF THE COURT

[10] Upon reading the affidavits filed and the written submissions of counsel for the judgment creditor and the judgment debtor and upon hearing the oral submissions of counsel aforesaid, the court dismissed the judgment creditor's

appeal on 5 April 2012.

GROUNDS FOR THE DECISION

[11] In the main, two issues were considered by the court during the appeal namely:

(a) whether the sum stated in the second bankruptcy notice was in excess of the judgment sum allowed; and

(b) whether the judgment debtor was estopped by the doctrine of res judicata from filing the summons in chambers dated 6 July 2011.

[12] To begin with, the court was satisfied that the judgment debtor had properly given notice disputing the validity of the second bankruptcy notice by filing the summons in chambers to set aside within the time as required by s 3(2)(ii) of the Bankruptcy Act 1967 (see *Re Khaw Siew Suan; Ex Parte Asia Commercial Finance (M) Bhd* [2001] 1 MLJ 101; [2000] 8 CLJ 516).

FIRST ISSUE — WHETHER THE SUM IN THE SECOND BANKRUPTCY NOTICE EXCEEDS THE AMOUNT ACTUALLY DUE

[13] A reading of the terms of the judgment dated 24 October 2008 clearly shows that the judgment creditor was only entitled to charge interest on the principal sums namely:

(a) 'Di bawah Kemudahan Jaminan Bank' at the rate of 3.5%pa above the judgment creditor's base lending rate of 6%pa; and

(b) 'Di bawah Kemudahan Pendahuluan Pinjaman Jangka Pendek' at the rate of 2%pa above the judgment creditor's base lending rate of 6% per annum (with additional interest at the rate of 1%pa after 1 December 2005 till settlement)

on a *flat or simple interest* basis and not on a *compounded interest* basis. This is so as the interest payable is to be calculated on a *yearly basis with no daily or monthly rests* stipulated in the judgment.

[14] In the second bankruptcy notice, the judgment creditor demanded payment of the principal sum of RM3,968,554.80 and interest in the sum of RM5,460,443.26 thereby totaling RM9,428,998.06. A perusal of the details of the calculations set out in the second bankruptcy notice shows that the interest calculated by the judgment creditor was on a *compounded interest* basis, which is not provided for in the judgment.

[15] The judgment debtor on the other hand had calculated the interest on

a *flat or simple interest* basis and arrived at the interest sum of RM4,528,142.36. Inclusive of the principal sum of RM3,968,554.80, the total sum due and payable was RM8,496,697.16. The judgment debtor's calculations can be seen in encl 7 – exh PP1.

[16] The difference in the amount of interest calculated by the judgment creditor and by the judgment debtor is RM932,300.90. The court is of the view that the basis of calculation of the interest by the judgment creditor is wrong as it is not provided for in the judgment.

[17] The amount claimed in the second bankruptcy notice is in excess of what is due, and as proper notice has been given by the judgment debtor disputing the amount on the ground of mistake, the second bankruptcy notice becomes invalid as it refers to a sum in respect of which the judgment creditor could not have issued execution (see *Re Arunachalam; Ex Parte Indian Overseas Bank Ltd* [1968] 1 MLJ 89).

[18] The excess sum which is a result of the wrong basis of calculation is *not* a mere formal defect or irregularity which could be remedied under s 131 of the Bankruptcy Act 1967 as contended by the judgment creditor (see *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; [1988] 1 CLJ (Rep) 277 (SC)). The court is of the view that the wrongful calculation of interest is not a mere irregularity which could be rectified without affecting the validity of the second bankruptcy notice. Substantial injustice will be caused to the judgment debtor by the defect/mistake as the difference is about RM1m. The excess interest claimed and the ensuing injustice caused to the judgment debtor cannot be remedied by an order of the court. Bankruptcy proceedings can have serious consequences for a debtor and I feel obliged to adopt the attitude that unless it can be manifestly shown that the irregularity or default was immaterial and in no way affected the rights of the judgment debtor, the second bankruptcy notice should be held to be bad in law. judgment creditors and their solicitors will be well advised to take note of their responsibility more seriously when preparing the bankruptcy notice.

[19] Counsel for the judgment creditor suggested that the mistake in the calculation, which was denied, could be rectified when the proof of debt was filed after the judgment debtor had been adjudged a bankrupt. This approach it would seem, smacks of unfairness as the judgment debtor would be adjudged a bankrupt for a much larger sum than what was actually due and owing. On the other hand, there seems to be no reason why the judgment creditor cannot issue a fresh bankruptcy notice for the proper interest sum due and payable especially when limitation has not set in.

[20] The court must be strict when dealing with, inter alia, bankruptcy

notices as bankruptcy proceedings are quasi penal in nature and as bankruptcy is a creature of statute, the provisions of the statute must be strictly followed. In the Supreme Court case of *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263; [1987] CLJ (Rep) 172 it was held by the court that 'a demand for payment of unspecified sums in the bankruptcy notice was not in accordance with the terms of the judgment, and applying the rule of strict construction the notice cannot be deemed to fall within s 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven days' period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy and a petition founded on it must necessarily fail'. A fortiorari the amount of interest claimable must be quantified correctly in the second bankruptcy notice so that the judgment debtor will know exactly and correctly what is being claimed to be due on the whole judgment debt.

[21] In the case of *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 2 AMR 2325, Gopal Sri Ram JCA (as he then was) held that the excess claimed in a bankruptcy notice is relevant and on the authorities the notice is invalid.

[22] During the hearing of the appeal counsel for the judgment creditor insisted that the interest claimed in the second bankruptcy notice was not calculated on a *compounded interest* basis and that the difference in the amount was due to changes in the base lending rate. In order to enable counsel for the judgment creditor to prove her contention, the court decided to adjourn the hearing for two weeks to afford both counsel the opportunity of verifying the calculations and to affirm on affidavit whether the interest was calculated on a *simple interest* or *compounded interest* basis.

[23] Counsel for the judgment debtor took the opportunity and filed an affidavit affirmed on 4 April 2002 (encl 20) setting out in detail the calculations of the interest on a *compounded interest* basis. The total amount (principal and interest) arrived at was in the sum of RM9,429,372.53 a sum slightly in excess of the amount stated in the second bankruptcy notice of RM9,428.98.06 by RM374.47. This clearly demonstrated that the calculation of interest by the judgment creditor in the second bankruptcy notice was on a *compounded interest* basis which was not provided for in the judgment. The judgment debtor has supported his contention by descending into the details to show the error of calculation by the judgment creditor.

[24] Unfortunately, no verification was done by counsel for the judgment creditor and no further affidavit was filed.

[25] The court was mindful of the general proposition of law that if a bankruptcy notice demands a sum which is greater than what is actually due and payable, the bankruptcy notice would not be liable to be held to be bad and therefore incapable of amendment. However, in this case, there was no attempt by the judgment creditor to amend the quantum of interest as the judgment creditor had held steadfast to its belief that there was no mistake or defect in its calculation of the interest. Further, as stated earlier, the difference of about RM1m in interest is not a mere irregularity or defect that could be cured or amended so as not to invalidate the proceedings. Simply put, this was not a s 131 of the Bankruptcy Act situation.

[26] The sum stated in the bankruptcy notice must correspond to the sum that is actually due and payable by the judgment debtor. It is the incumbent duty of the judgment creditor to state the correct sum due in the second bankruptcy notice. When the quantum in the second bankruptcy notice is questionable, the bankruptcy notice must necessarily fall. In *Ghazali bin Mat Noor v Southern Bank Berhad And Four Other Appeal* [1988] 2 MLJ 142; [1989] 1 CLJ Rep 35 it was held by the Supreme Court that:

> For a bankruptcy notice to be valid, it should state the exact amount due as at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make any calculations or enquiries.

Accordingly the second bankruptcy notice has been rendered invalid ab initio.

SECOND ISSUE — WHETHER THE JUDGMENT DEBTOR IS ESTOPPED BY REASON OF RES JUDICATA

[27] Counsel for the judgment creditor contended that the judgment debtor cannot apply to set aside the second bankruptcy notice as he had applied to set aside the first bankruptcy notice on the same ground but was unsuccessful in the Court of Appeal.

[28] The court is of the view that the judgment debtor is not prevented from applying to set aside the second bankruptcy notice by reason of res judicata based on the following grounds:

(a) for some unexplained reason the judgment creditor chose not to proceed with the first bankruptcy proceedings after the decision of the Court of Appeal but instead decided to issue the second bankruptcy notice;

(b) albeit the parties are the same in the second bankruptcy notice, the bankruptcy proceedings are distinct and separate in that the sum claimed in the second bankruptcy notice is vastly different;

(c) it was averred by the judgment debtor in his affidavit in reply dated 12 September 2011 (encl 7) that the reason why the Court of Appeal had dismissed the judgment debtor's appeal was that the calculation made by the judgment debtor in the first bankruptcy notice was not in accordance with the base lending rate of the judgment creditor and that the appeal would have been allowed if the calculations were in fact based on the judgment creditor's base lending rate. This averment by the judgment debtor in his affidavit was not challenged nor denied by the judgment creditor;

(d) in the present case, the judgment debtor has set out his calculations based on the base lending rate of the judgment creditor, calculated on a simple interest basis and not on a *compounded interest* basis (see encl 7 exh PP1). These calculations have been compared with the calculations set out in encl 20 – exh CS1, which have been calculated based on the base lending rate of the judgment creditor on a compounded interest basis. This clearly shows that while the subject matter may be similar ie calculation of interest, it is separate and distinct as the judgment debtor's objection to the second bankruptcy notice is on the mode or basis of calculation;

(e) logic dictates that the judgment creditor cannot rely on res judicata to prevent the judgment debtor from objecting to the second bankruptcy notice simply because the Court of Appeal had dismissed the judgment debtor's objection to the first bankruptcy notice. If that were so, there would be nothing to fetter or restrain the judgment creditor from claiming for any new sum calculated on any basis in the second bankruptcy notice in total disregard of the terms of the judgment. In this case, it is clear and obvious that the sum claimed in the first bankruptcy notice is different from that claimed in the second bankruptcy notice; and

(f) the court is of the view that the facts of this case will not attract the application of an estoppel per rem judicatum, either as a cause of action estoppel or issue estoppel, as expounded by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783.

[29] In the result, the appeal of the judgment creditor was dismissed with costs of RM3,500.

Appeal dismissed with costs of RM 3,500.

Reported by Kohila Nesan